United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7588

B

P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GAYLE MC QUOID HOLLEY, Individually and on behalf of JAMES MC QUOID, NORMAN MC QUOID, THOMAS MC QUOID, DOUGLAS MC QUOID, MICHAEL MC QUOID and ADELAINE MC QUOID, her minor children,

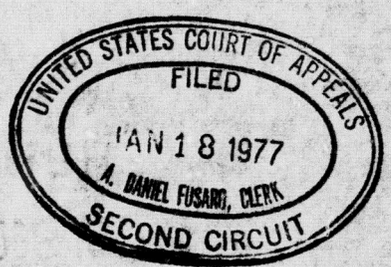
Plaintiffs,

- against -

ABE LAVINE, as Commissioner of the NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, and JAMES REED, as Commissioner of the MONROE COUNTY DEPARTMENT OF SOCIAL SERVICES,

Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK



BRIEF FOR DEFENDANT - APPELLEE MONROE COUNTY COMMISSIONER - JAMES REED

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QUESTIONS PRESENTED

1. Is Section 131-k of the New York State Social Services Law inconsistent with and/or violative of the Social Security Act and/or the Code of Federal Regulation?

The Court below answered this question in the negative.

2. Should the Court below have requested the convening of a three-judge court relative to the plaintiffs constitutional claim?

The Court below denied plaintiffs application for such relief.

STATEMENT OF CASE

In the United States District Court for the Western District of New York, PLAINTIFFS sought an order declaring Section 131-k (Social Services Law of New York State) invalid, and also a temporary restraining order and a permanent injunction restraining defendants from enforcement of section 131-k; they also sought the convening of a three-judge Court to hear and determine their constitutional challenge to section 131-k; they also sought damages by way of retro-active public assistance benefits, together with costs, disbursements and attorneys' fees.

Both appellees served Notices of Motions to Dismiss and the Court heard the arguments of all sides. By Order dated July 30, 1975, the Said District Court (Judge Burke) dismissed the plaintiffs complaint on the grounds of lack of jurisdiction over the subject matter, and because the complaint fails to state a claim upon which relief may be granted. A Judgment was entered on July 31, 1975.

The said judgment was appealed to this Court which reversed the decision of the lower court (529 F.2d 1294). Thereafter, the Federal Supreme Court denied a writ of certiorari which was requested by the present State Commissioner of Social Services; namely, Philip L. Toia (Successor to Abe Lavine).

Both State and County Commissioners submitted their Answers to the Complaint, (17) and (26).

The plaintiffs instituted proceedings seeking an Order granting summary judgment to the plaintiffs on the first, second and fourth causes of action as set forth in her complaint or in the alternative, for an Order requesting that a three-judge District Court be convenied relative to the plaintiffs constitutional claims as set forth in her complaint (34).

Thereafter, both the New York State and the Monroe County Commissioners of Social Services cross-moved for summary judgment relative to the complaint (38).

On November 18, 1976 the District Court granted the cross-motions of both defendants and denied the plaintiffs motion for summary judgment on the request for the convening of a three-judge court to hear her constitutional claims (94-95).

Thereafter, the plaintiffs processed and appealed to this Court.

FACTS

Section 131-k of the New York State Social Services Law was enacted subsequent to the creation of section 233.50 (45 Code of Federal Regulations) which became effective January 2, 1974 (Appendix p.16). Section 131-k entitled "Illegal Aliens", provides the following:

> 1. Any inconsistent provisions of this chapter or other law notwithstanding, an alien who is unlawfully residing in the United States or who fails to furnish evidence that he is lawfully residing in the United States shall not be eligible for aid to dependent children, home relief or medical assistance, except for a temporary period for thirty days in accordance with subdivision two of this section.
>
> 2. An otherwise eligible applicant or recipient who has been determined to be ineligible for aid to dependent children, home relief or medical assistance because he is an alien unlawfully residing in the United States or because he failed to furnish evidence that he is lawfully residing in the United States shall, nevertheless, be elibible to receive home relief and medical assistance for a temporary period not to exceed thirty days from the date of such determination in order to allow time for the referral of the cases to the United States immigration and naturalization service, or nearest the consulate of the country of the applicant or the recipient, and for such service or consulate to take appropriate action or furnish assistance.

Therafter, New York State Regulation Section 349.3 (Title 18 N.Y.C.R.R.) was created to implement the said New York Statute. (Appendix pp. 30 and 37).

By transmittal number 74-ADM-110, an Administrative Letter dated July 15, 1974, effective August 1, 1974, was sent to the local welfare Commissioners in New York State relative to 45 C.F.R. Section 233.50 (Appendix p. 37).

The plaintiff, an alien illegally residing in the United States, was accordingly timely and duly notified by the defendant Monroe County Department of Social Services that she was being deleted from the welfare grant - at the same time, she was notified that her six United States citizen children would remain on the public assistance rolls. The said plaintiff was taken off the grant and the children still remain on the rolls as full public assistance recipients. At a hearing requested by the plaintiff, testimony was taken, and the State Department of Social Services affirmed the action of the defendant Monroe County Welfare Commissioner, James Reed, in deleting the said plaintiff from the grant, citing the aforementioned state Regulation, and the further fact that the United States Department of Justice, Immigration and Naturalization has determined that the plaintiff, GAYLE MC QUOID HOLLEY, is an alien, illegally in the United States.

The said plaintiff, GAYLE MC QUOID HOLLEY, married one WAYNE HOLLEY in February 1975.

According to the Income Maintenance records with the Monroe County Department of Social Services the plaintiff and her husband receive a total of $474.53 Social Security benefits for themselves and certain of their children, and in addition thereto five children receive AFDC benefits in the sum of $374.84 making a total monthly income in the household of $849.37.

POINT I

SECTION 131-k OF THE NEW YORK STATE SOCIAL SERVICES LAW IS NOT VIOLATIVE OF THE SOCIAL SECURITY ACT OR ANY FEDERAL REGULATIONS. IT IS CONSISTENT AND IN CONFORMITY WITH BOTH THE FEDERAL STATUTES AND THE FEDERAL REGULATIONS.

It is argued by the plaintiff herein that Section 131-k is more restrictive then the pertinent Federal Regulation (Title 45 C.F.R. section 233.50) in that the New York Statute does not contain a clause relative to aliens 'otherwise permanently residing in the United States under 'color of law'.

Section 131-k actually follows and supplements the Federal Regulation. Likewise, Title 18 N.Y.C.R.R. section 349.3 in implementing Section 131-k is in accord with 45 C.F.R. 233.50. Just because the State statute does not contain the exact wording of a Federal Regulation or Federal Statute it cannot be validly claimed that the State statute fails to conform to the superior Federal Regulation and/or statute. Relying on the 'under color of law' wording in the federal Regulation and the absence of it in the state statute, plaintiff argues in effect that 131-k obstructs the effectuation of the federal policy expressed in the federal Regulation. Actually, 131-k and 45 C.F.R. 233.50 are in accord with each other, and compatible.

In this case, the State and Federal government are both attempting to achieve a mutual purpose; namely, to exclude illegal aliens from the class of persons who are otherwise eligible for public assistance benefits.

Both the Federal Regulation and the State Statute herein have a common objective, that is, to see to it that only those eligible and needy will

receive public assistance. As was stated in the three-judge decision in the case of Doe v. Maher et al., 414 F.Supp. 1368 (U.S. District Court, Connecticut decided June 1, 1976) :

> "...the existence of this broad area of mutuality of purpose of state and federal authority is insufficient to completely preclude state action. Decanas v. Bica, ___ U.S.____, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976). Thus, the argument that § 52-440b is invalid because Congress has not chosen to require contempt proceedings against an uncooperative mother cannot be sustained. Congressional purpose to displace local laws must be clearly manifested. H. P. Welch Co. v. New Hampshire, 306 U.S. 79,85,59 S.Ct. 438,83 L.Ed.500 (1939). Where the federal statute has not expressly proscribed certain action but has merely been silent there is no basis for an inference that Congress intended to forbid state supplementary action. The intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the state. This principle has had abundant illustration....." (Citations omitted). Savage v. Jones, 225 U.S.501, 533, 32 S.Ct. 715,726, 56 L.Ed.1182 (1912).

The Court further states that the identity of State and Congressional purpose does not furnish a sufficient basis for a finding of congressional intent that the State should refrain from taking steps beyond those which Congress requires of it to achieve their mutual purpose.

The Doe court went on to cite New York State Department of Social Services v. Dublino, 413 U.S.405,415, 93 S.Ct. 2507, 2514, 37 L.Ed.2d 688

(1973) wherein the Federal Supreme Court held that State work incentive programs in the administration of the AFDC program , which were complementary to those of H.E.W., were not pre-empted. In that case the following was stated:

> "... In considering the question of possible conflict between the state and federal work programs, the court below will take into account our prior decisions. Congress 'has given the States broad discretion', as to the AFDC program, Iefferson v. Hackney, 406 U.S.535, 545 (92 S.Ct. 1724,32 L.Ed.2d 285) (1972); see also Dandridge v. Williams, 397 U.S. at 478 (90 S.Ct. 1153, 25 L.Ed.2d 491); King v. Smith, 392 U.S. 309, 318-319 (88 S.Ct. 2128,20 L.Ed.2d 1118) (1968), and 'so long as the State's actions are not in violation of any specific provision of the Constitution or the Social Security Act,' the courtsmay not void them. Jefferson, supra, at 541(at 1729 of 92 S.Ct.) Conflicts, to merit judicial rather than co-operative federal-state resolution, should be of substance and not merely trivial or insubstantial. But if there is a conflict of substance as to eligibility provisions, the federal law of course must control. King v. Smith, supra; Townsend v. Swank, 404 U.S. 282 (92 S.Ct. 502, 30 L.Ed.2d 448) (1971); Carleson v. Remillard, 406 U.S. 598 (92 S.Ct. 1932, 32 L.Ed.2d 352) (1972), 413 U.S. at 423 29, 93 S.Ct. at 2518....."

In the Doe case the plaintiffs claimed that a Connecticut Welfare Statute (Con.Gen. Stat.Ann.§ 52-440b) conflicted with the Social Security Act, as was the case in the Doe decision. It is contended herein that Section 131-k 'builds' upon a legal obligation established by the state and supplements, but does not alter or supplant, the federal law. (Doe v. Maher, at page 1381, Supra).

The Court then stated there is no reason why the State of Connecticut "might not properly beget a more serious penalty, if the Connecticut legislature deemed it wise". California v. Zook, 336 U.S. 725,736, 69 S.Ct.841, 846, 93 L.Ed. 1005 (1949).

Section 131-k not only conforms to the Federal Regulation (45 C.F.R. Section 233.50) but it strengthens it. A State statute does not have to set forth word for word the Federal statute and/or Regulation it implements in order to be compatible with it. (See: Doe v. Maher, Supra).

It is contended by defendant James Reed that, contrary to the statements set forth in paragraph 2 page 8 of the plaintiffs brief, that the plaintiff is not eligible for public assistance under the federal Regulations. Those regulations are directed to a class of persons of which the plaintiff is a member; namely, an illegal alien. Since there is no authority to sustain an allegation that this plaintiff is in the United States under color of law, she is one of the persons to whom the Regulation is directed, and is under the category with the Immigration and Naturalization Service, as an illegal alien.

Indeed, the I.N.S. has stated that the plaintiff 'is illegally in the United States'. The argument of plaintiff is without merit when she claims that the status of an illegal alien ripens into the status of an alien lawfully admitted into the United States.

At the Administrative fair hearing which this plaintiff originally sought and received with the New York State Department of Social Services her testimony

showed that she admittedly had received no papers or other cards or identification. In accordance with the Immigration and Naturalization Service; her testimony was that she does not possess an I-94 form, nor was one ever issued to her. The relevance of whether the plaintiff has ever been issued such a form is as follows: By an Administrative Letter dated July 15, 1974, issued by way of a transmittal paper to all commissioners of Social Services Departments in the State of New York, the New York State Department of Social Services notified the commissioners, effective August 1, 1974, of the change in the applicable laws, both on the federal and the state level, regarding aliens illegally in the country.

The Transmittal Letter recites the Federal Regulation and its effective date of January 2, 1974 relative to the ineligibility for public welfare of aliens residing in the country unlawfully, and states the basic provisions of the Department's policy as contained in welfare Regulation 349.3. Further set out in the Letter is a 'work-flow' procedure to implement the new law. At page '4' thereof, the following appears:

> "...Note: The INS Booklet Documentary Requirements for aliens in the United States (attachment 2) provides examples of typical documents carried by aliens....."

The Workflow instructions continue on page '4' at Item 4(b) which states as follows:

> "....Evidence of Permanent Residence in the United States Under COLOR OF LAW. (Underline Furnished)
>
> 1. INS Form I-94 (arrival)-Departure Record endorsed Refugee-CONDITIONAL ENTRY.

"...2. INS Form I-94 endorsed to show bearer has been paroled for an indefinite period pursuant to Section 212 (d)(5) of the Immigration and Naturalization Act....."

Section 212 (d)(5) is the same section set out in the wording of the pertinent federal Regulations, namely, 45 C.F.R. Section 233.50.

"... c. Evidence of lawful admission for permanent residence in the United States.

1. Alien Registration Receipt Card (INS Form I-151).

2. A Re-entry permit ....."

The facts brought out at the 'Fair Hearing' before the representative of the New York State Social Services Department show that the plaintiff herein does not have any of the aforementioned documents. She was never issued such documents because she is illegally residing in the United States. If she were residing in this country legally, or otherwise residing 'under color of law', she would have been issued an I-94 card. Accordingly, under the applicable requirements of the defendant REED as the Commissioner of the Monroe County Social Services Department, and pursuant to the requirements of Section 212 (d) of the Immigration and Naturalization Act, the said Form would be her proof of residing 'under color of law'.

POINT II

LEGISLATIVE ENACTMENT CAN VALIDLY RESTRICT WELFARE BENEFITS TO ONLY THOSE CLASSES OF PERSONS WHO ARE ELIGIBLE

At paragraph 24 of the plaintiffs Complaint (3) in her first cause of action is cited Section 402(a)(10) of the Social Security Act 42 U.S.C. section 602(a)(10) in part as stating:

> "...that aid to families with dependent children shall be furnished with reasonable promise to all eligible individuals...."

This sentence has been interpreted by the United States Supreme Court in Jefferson v. Hackney, supra in the following language:

> "...Nor are appellants aided by their reference to Social Security Act s 402 (a)(10), 42 U.S.C.s 602(a)(10), which provides that AFDC benefits must "be furnished with reasonable promptness to all eligible individuals". That section was enacted at a time when persons whom the State had determined to be eligible for the payment of benefits were placed on waiting lists, because of the shortage of state funds. The statute was intended to prevent the States from denying benefits, even temporarily, to a person who has been found fully qualified for aid. See H. R. Rep.No.1300,81st Cong., 1st Sess., 48, 148 (1949); 95 Cong. Rec. 13934 (remarks of Rep.Forand). Section 402 (a)(10) also prohibits a State from creating certain exceptions to standards specifically enunciated in the federal Act. See, e.g. Townsend v. Swank, 404 U.S. 282 (1971). It does not, however, enact by implication a generalized federal criterion to which States must adhere in their computation of standards of need, income and benefits. Such an interpretation would be an intrusion into an area in which Congress has given the States broad discretion, and we cannot accept appellants' invitation to change this longstanding statutory scheme simply for policy consideration reasons of which we are not the arbiter....."

Indeed, recent Supreme Court ruling have made it abundantly clear that eventhough a person might be 'needy', nevertheless, public assistance benefits will be terminated and/or denied initially in the event that person fails to comply with the requirements of the Department of Social Services relating to eligibility. (See: Snell v. Wyman, 281 F.Supp. 853, affirmed in 393 U.S. 323 (1969) where a three-judge federal court upheld the validity of the New York State Recovery Statutes (Social Services Law sections 101-106) against both statutory and constitutional attack. The court held that a welfare recipient and/or applicant can be terminated and/or denied welfare benefits for failure to comply with the requirements of executing a Mortgage in favor of the welfare department and/or liens and/or Assignments as to present and future property. (See: also Charleston v. Wohlgemuth et al., 332 F.Supp. 1175) (Three-judge court - Eastern District of Pennsylvania decided 9-10-71 and affirmed by the U.S. Supreme Court in 405 U.S. 970, 92 S.Ct. 1204,31 L.Ed.2d 246).

In that case the court held that certain welfare statutes and Regulations of the Commonwealth of Pennsylvania requiring AFDC applicants, who own certain types of real or personal property, to agree in writing as condition of receiving continued and/or initial public assistance to give the Commonwealth a Lien on the property as security. In that case the plaintiffs challenged the requirements on both statutory and constitutional grounds. The court held that there is no violation of the Due-Process or Equal Protection Clause of the 14th Amendment, and that there is no conflict with the Social Security Act or the Federal Regulations.

In that case the plaintiffs cited King v. Smith, 277 F.Supp. 31 affirmed in 392 U.S. 309, which case is also cited by the plaintiff herein in reliance upon her argument that 131-k contravenes the Social Security Act of 1935. The 'Charleston' court not only made it clear that the parent can be terminated or denied public assistance benefits for failing to comply with the welfare requirements regarding liens and assignments, but also held that all minor members of the family unit would likewise be denied or terminated from public assistance benefits because of the parents refusal to comply.

In so ruling, the court stated that there can be no separate classification for the children of the applicant or the recipient. (Charleston v. Wohlgemuth, supra). The court went on to cite the case of Wyman v. James, 400 U.S. 309, 91 S.Ct. 381, 27 L.Ed.2d 408 in support of the proposition that eventhough 'needy', a person will be denied initial and/or continued welfare benefits for failure to comply with the eligibility requirements of the welfare department. Yet, another ruling by the U.S. Supreme Court (Department of Social Services v. Dublino, supra) further reiterates the proposition that a person although 'needy' may be denied welfare benefits for failing to comply with the eligibility requirements.

Each of the above cases make it clear that State legislation does not contravene federal Regulations or the Social Security Act because it sets forth requirements which it determines to be in the best interest of the state and which furthers a legitimate state interest. In the instant case, the plaintiffs reliance on King v. Smith, supra is misplaced.

At page 1181 (Charleston vs. Wohlgemuth - ibid), Federal District Judge Edward R. Becker, speaking for the three-judge court states;

> "...Under the Pennsylvania regulations public assistance is denied to welfare applicants or recipients who refuse to sign PA-9 or PA-176 forms when the circumstances requiring them to do so arise. The duty to execute the forms rests with the adults; the denial of benefits extends to the entire family unit. Plaintiffs' statutory argument is essentially that the requirements that a PA-9 or PA-176 form be signed in order that assistance be paid or continued, constitutes the imposition of an additional criterion for AFDC eligibility beyond need and dependency, and that such a requirement is in conflict withthe Social Security Act....."
>
> (Underlines Furnished)

The court then goes on to state that the 'statutory' argument is spun from the holding in 'King vs. Smith', 277 F.Supp. 31, affirmed in 392 U.S. 309 (1968).

The court continues (page 1181) by saying:

> "....As we will see, 'King', 'Cooper' and 'Stoddard' cannot prevail here. Exposition of the reason they cannot requires an exegesis of Snell vs. Wyman (giving the Snell citations).. which is the controlling precedent in this case....."
>
> (Underlines Furnished)
>
> .....The immediate significance of Snell in the context of this case is plain, Construing a basically similar state plan, the Snell court upheld the validity of the reimbursement and lien provisions, and rejected the contention that the provisions were in conflict with the Social Security Act. In the absence of meaningful distinguishing factors, Snell has a controlling impact.....
> ..... Sensing the impact of Snell upon their case, plaintiffs contend that it is 'largely distinguishable...and to the extent that it is not, is incorrect'. (Supplemental Brief) ...If Snell is incorrect, and we do not believe it is, there is plainly nothing that this Court can do about it, since, by virtue of affirmance, Snell now represents the teaching of the Supreme Court Neither do we think it to be distinguisable....."
>
> (Underlines Furnished)

All classes of needy persons are not merely by the fact that they are needy, eligible for welfare benefits. The additional requirement in accordance with the decisions of the aforementioned cases is that they meet the state's eligibility requirements. (See: Opinion of the Justices to the House of Representatives, ____ MASS. _____, 333 N.E.2d 388 (Supreme Judicial Court of Massachusetts, July 29, 1975) (Appendix B).

(See also: Dandridge v. Williams, 397 U.S. 471, 90 S.Ct.1153, 25 L.Ed2d 491 (1970) citing Lindsley v. National Carbonic Gas Company, 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed2d 369).

If the children of an applicant and/or recipient and the parent can be terminated and/or denied welfare benefits because of the parents failure to comply with a state's eligibility requirements ('Charleston v. Wohlgemuth, supra) then certainly the parent can be eliminated from the grant eventhough she might be deemed to be in the category of a 'caretaker'. In such case, the argument that such eligibility requirement is violative of federal statute (Social Security Act) is without merit (Doe v. Maher and Snell v. Wyman, supra).

CONCLUSION

For the foregoing reasons, the District Court's judgment appealed from should be affirmed in all respects. As to the plaintiffs request for attorneys fees, in any event, such application should be denied based upon the decision of the United States Supreme Court; namely, Alyeska Pipeline Service Company vs. Wilderness Society, 421 U.S. 240, 43 U.S.L.W. 4549 decided on May 12, 1975, since the instant proceeding was instituted prior to the enactment of the Civil Rights Attorneys Fee Awards Act of 1976.

Dated: January 14, 1977

Respectfully submitted,

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APPENDIX A

(3) 7/23/74

STATE OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES
1450 WESTERN AVENUE
ALBANY, NEW YORK 12203

ABE LAVINE
Commissioner

Effective: August 1, 1974

ADMINISTRATIVE LETTER

TRANSMITTAL NO.: 74 ADM-110

DATE: July 15, 1974

TO: Commissioners of Social Services

SUBJECT: Citizenship and Alien status as a condition of eligibility for Aid to Dependent Children, Home Relief, and Medical Assistance

Suggested DISTRIBUTION: All Public Assistance Staff
All Medical Assistance Staff

I. Introduction

Effective January 2, 1974 Federal Regulations require United States citizenship or status as an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States as a condition of eligibility for Federal financial participation in Aid to Dependent Children, Medical Assistance and social services. The Social Services Law was amended by Chapter 811 of the Laws of 1974, effective June 7, 1974 to permit implementation of the Federal requirement and to extend the requirement to Home Relief.

II. Policy

The Department's policy concerning illegal aliens is contained in a new Section 349.3 of Chapter II of Title 18 NYCRR. Basic provisions include:

* An alien who is unlawfully residing in the United States, or fails to furnish evidence that he is lawfully residing in the United States is not eligible for Aid to Dependent Children, Home Relief, Medical Assistance and Federally participating social services except that Home Relief and Medical Assistance shall be granted for a temporary period of thirty days in order to allow time for the referral of the case to the United States Immigration and Naturalization Service, or the nearest consulate to take appropriate action or furnish assistance.

III. Program Implementation

A. Determination of Eligibility

Work flow procedures for use in determining citizenship and alien status are contained in Section IV below.

FILING REFERENCE
Dept. Regs.
349.3, 351.1, 351.2
351.20

B. Example

An ADC application or case:

Mother - has been determined ineligible by the agency in accordance with the outlined procedure because she is not a citizen or an alien legally residing in the United States.

Children - all born in the United States and by reason thereof are United States citizens.

If otherwise eligible, the mother shall be granted MR for thirty days and the children granted ADC. At the end of thirty days, MR for the mother will be discontinued but the children continue to receive ADC.

C. Determination of the thirty-day period

Failure of the applicant/recipient to provide documentation to prove citizenship or legal alien status shall result in a finding of ineligibility by the agency and the thirty-day period shall start as of the date such a decision is made. Immediate referral shall be made to the Immigration and Naturalization Service. If, as a result of the referral, INS indicates within the thirty-day period that the individual has legal status, the case, if otherwise eligible, shall be continued in the appropriate category. In all other cases, assistance will be discontinued at the end of thirty days.

D. Claiming Procedure

Although these cases are not subject to Federal reimbursement, expenditures made on their behalf shall be claimed under the appropriate program for a temporary period not to exceed thirty days in accordance with normal claiming procedures. If Federal reimbursement has been claimed since January 2, 1974 any adjustment which may be required as a result of the retroactive date shall be handled within the self-audit process in order to reverse any Federal and State aid claimed improperly.

IV. Work flow Procedures for Determining Citizenship and Alien Status and Granting Assistance

Function	Action
Citizenship/Alien Status Review for Eligibility	
Public Assistance Application Note: Form DSS-1994 has been reviewed as of March 1974 but is not yet available.	1. Enter place of birth for each individual applying for assistance: a. See section of Form DSS-1994, Application/Certification for Public Assistance: i. Version dated 3/74 - Section A. ii. Version dated 12/72 - Section C.
Medical Assistance Application	b. Form DSS-515, Application for Medical Assistance. Enter the place of birth of each individual applying for Medical Assistance in the Documentation Required shaded area of Section B.
Note: Carefully compare signature and photograph for match with Form DSS-1994 or Form DSS-515.	2. Verify the citizenship of each person born in the United States. The following is adequate verification: a. A certified copy of a public record of birth or a religious record of birth or baptism evidencing birth in the United States. b. A United States passport.
Public Assistance Application Note: Attachment 1 shows Section X of the 3/74 revision of DSS-1994.	3. For each person not born in the United States, record immigration/naturalization information: a. On the 3/74 version of Form DSS-1994, complete Section X. b. On the 12/72 version of Form DSS-1994, complete Section X, and in addition enter items (i) and (ii) under Section e below.

Medical Assistance
Application
Note: Form DSS-515 is being revised to incorporate this information.

c. On the Form DSS-515, enter in space available on page 10 the following:

i. Port of Entry
ii. Status with Documentary Evidence
(a) Naturalized Citizen Certificate No.
(b) Permanent Resident Alien Registration No.
(c) Temporary Non-Immigrant Alien Immigrant File No.
(d) Other Specify Documentation

4. Verify citizenship/alien status of each person not born in the United States.

a. Evidence of U.S. citizenship

i. Certificate of citizenship.
ii. Certificate of naturalization.
iii. United States passport.
iv. Identification card for use of Resident Citizen in the United States (INS Form I-179 or INS Form I-197).

Note: The INS booklet Documentary Requirements for Aliens in the U.S. (Attachment 2) provides examples of typical documents carried by aliens. Copies of this booklet are available at this address:

United States Department of Justice
Immigration and Naturalization Service
26 Federal Plaza
New York, New York 10007

b. Evidence of permanent residence in the United States under color of law

i. INS Form I-94 (arrival-Departure Record) endorsed REFUGEE-CONDITIONAL ENTRY.
ii. INS Form I-94 endorsed to show bearer has been paroled for an indefinite period pursuant to Section 212 (d) (5) of the Immigration and Naturalization Act.

c. Evidence of lawful admission for permanent residence in the United States

i. Alien Registration Receipt Card (INS Form I-151).

ii. A re-entry permit.

5. If any person:

   a. is unable to verify citizenship/alien status, or

   b. present documentation of questionable validity,

Complete Form DSS-2361, Verification of Alien Status, and mail promptly to INS.

Note: Attachment 3 is copy of Form DSS-2361 and instructions for its use.

The following Social Services Districts shall mail the DSS-2361 to INS in New York City:

New York City and

Counties of:

Broome	Rockland
Dutchess	Suffolk
Nassau	Sullivan
Orange	Ulster
Putnam	Westchester

All other Social Services Districts shall mail the DSS-2361 to INS in Buffalo, NY.

The appropriate address for INS has been preprinted on the DSS-2361.

Granting of Assistance

6. For any otherwise eligible applicant or recipient who is unable to provide acceptable evidence that he is not an alien illegally residing in the United States

   a. Grant Home Relief and/or Medical Assistance for 30 days.

   b. Refer to INS using Form DSS-2361.

Note: MA is granted only in accordance with Department Regulation 360.11 (a)(5)

7. If INS verification indicates that the citizenship/alien status is legal, provide assistance in the appropriate category.

Effective Date

For all new applications and recertifications on and after August 1, 1974.

Deputy Commissioner

jects of state regulation are so peculiarly of local concern as is the use of state highways." *South Carolina State Hy. Dept. v. Barnwell Bros. Inc.*, 303 U.S. 177, 187, 58 S.Ct. 510, 515, 82 L.Ed. 734 (1938). State legislation in the field of safety is particularly appropriate. See *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 783, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). There is no showing here that the incidental burden imposed on interstate commerce is "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. at 142, 90 S.Ct. at 847 (1970). Cf. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529, 79 S.Ct. 962, 3 L.Ed.2d 1003 (1959). The bill does not on its face violate the Commerce Clause.

We answer question 2, "No."

G. JOSEPH TAURO
PAUL C. REARDON
FRANCIS J. QUIRICO
ROBERT BRAUCHER
EDWARD F. HENNESSEY
BENJAMIN KAPLAN
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WEST KEY NUMBER SYSTEM

OPINION OF THE JUSTICES TO THE HOUSE OF REPRESENTATIVES.

Supreme Judicial Court of Massachusetts.

July 29, 1975.

Questions were propounded by the House of Representatives to the Justices of the Supreme Judicial Court inquiring whether bill delegating to department of public welfare the power to determine eligibility for assistance without establishing any guidelines therefor would violate constitutional section providing for separation of legislative, executive and judicial departments, whether bill making certain employed parents ineligible for assista would be in violation of federal statute whether bill making a person who ha dependent children and who is determ by the department to be employable ine ble for assistance violates due process a equal protection, and whether bill dele ing to the department the power to pro financial assistance for such medical or services as the Social Security Act regulations adopted by Secretary Health, Education and Welfare re without any further guidelines, violat Constitution. The Justices of the Supr Judicial Court were of the opinion that bill did not violate constitutional ar providing for separation of the va governmental departments, and that th did not violate equal protection or process.

Questions answered.

1. Administrative Law and Procedure

Specific standards need not be s in a statute where administrative a can find general guidance in purpos overall scheme of the statute.

2. Constitutional Law ⇐82(10)

Social Security and Public Welfare

Fact that proposed bill which p inter alia, that the Commonwealth by and through the department of welfare, shall provide assistance t monwealth residents found by the ment to be eligible for such a failed to prescribe the contours of a al standard of need did not render valid on grounds that it improper gated authority to the departm department is required by statute t late a standard budget of assistan equacy of which is reviewable and since the department has tra determined the standard of need f ents and undoubtedly has develope pertise in the complexities of th M.G.L.A. c. 18 § 2(B)(g); c. 11 G.L.A.Const. pt. 1, art. 30.

...al Security and Public Welfare ⇐5

...scretion to be exercised by department ... of public welfare in determining ... d of need and, hence, the eligibility ... general relief, is circumscribed ... a number of devices, including ... which provide that welfare serv... must be fair, just and equitable, which ... for judicial review of department ... ons, for review of individual deter... ns of ineligibility, and which re... department to formulate the poli... procedures necessary for full and ... implementation of general relief ... M.G.L.A. c. 18 §§ 2(B)(a, d, g), ... 30A §§ 7, 14; c. 117 § 1 et seq.

...stitutional Law ⇐62(10)

...al Security and Public Welfare ⇐1, 3

... which states that Commonwealth, ... through department of public wel... will provide assistance to Common... resident found by department to be ... for such assistance does not re... the department, as formerly, to pro... recipients with sufficient assistance ... maintain an adequate standard of liv... bill does not give department un... ...ed discretion, and such delegation ... not violate constitutional article pro... for separation of the various de... ...ents of government; rather, the leg... ..., in determining amount of appro... ...n for general relief, makes the criti... ...ice with regard to level of benefits, ... the department then must formulate ... ...cies, procedures and rules necessary ... ...ll and effecient implementation of ... ...al relief program. M.G.L.A. c. 18 §§ ... seq. 2(B)(a, d); M.G.L.A.Const. pt. ... 30.

...cial Security and Public Welfare ⇐241

... which would delete statutory re... ...ent that 17 medical care services be ... ...ed, and which would instead require ... ...at department of public welfare pro... ...assistance for those services that are ... ...atory under the Social Security Act ... ...der regulations promulgated by the Secretary of Health, Education and Welfare, involved no delegation of authority problem since the department has no choice but to follow these various specific federal requirements. M.G.L.A. c. 18 § 10; c. 118E §§ 1, 3, 6; M.G.L.A.Const. pt. 1, art. 30; Social Security Act, §§ 1902(a)(13)(B), (a)(13)(C)(ii), 1905(a)(1–5), 42 U.S.C.A. §§ 1396a(a)(13)(B), (a)(13)(C)(ii), 1396d(a)(1–5).

6. Constitutional Law ⇐62(1)

Legislature is permitted to delegate to an administrative agency the authority to determine how to spend funds appropriated for a general purpose so as best to carry out that purpose.

7. Constitutional Law ⇐62(10)

Social Security and Public Welfare ⇐241

Delegation of authority to department of public welfare under bill which provides, inter alia, that department may provide financial assistance for additional medical care or services as Social Security Act and regulations permit, was not improper since statutes require the department to formulate its policies so as to serve best interests of medical service recipients considering available funds appropriated, since medical assistance program would be administered in conformity with the Social Security Act, since regulations of the Department of Health, Education and Welfare require that state plan specify amount and/or duration of each item of medical care that will be provided, and since department's choice of services would be subject to review. M.G.L.A. c. 18 § 16; c. 30A §§ 3, 7; c. 117 § 1 et seq.; c. 118 § 1 et seq.; c. 118E §§ 1, 6(2), 9, 22; Social Security Act, §§ 1901, 1902(a)(17), 42 U.S.C.A. §§ 1396, 1396a(a)(17).

8. Constitutional Law ⇐62(1)

Complexity of decision-making process is not the litmus paper for testing validity of a legislative delegation of authority to an administrative agency.

9. Social Security and Public Welfare ⇐241

Department of public welfare is in as good a position, if not a better one, as the legislature to evaluate all the factors going into determination of how best to provide for medical care of the needy within the constraint of a limited budget. M.G.L.A. c. 118E §§ 6, 6(2).

10. Social Security and Public Welfare ⇐1

Statute relating to general welfare is subject to all federal constitutional requirements. M.G.L.A. c. 117 § 1 et seq.

11. States ⇐4.5

State is entitled to spend its own funds for welfare purposes without federal statutory constraints.

12. Social Security and Public Welfare ⇐192

Bill which provided, inter alia, that person who had applied to department of public welfare for assistance under statute relating to aid to families with dependent children as an unemployed parent, and who would be eligible for such assistance under such statute but for waiting period of 30 days required by federal law, shall not be eligible for assistance under statute relating to general relief, would have no effect on Commonwealth's administration of aid to families with dependent children or any other federal program, but rather constituted an amendment to the eligibility standards of a wholly state funded general assistance program. M.G.L.A. c. 117 §§ 1 et seq., 4; c. 118 § 1 et seq.; Social Security Act, §§ 401–444, 407(a), (b)(1)(A), 42 U.S.C.A. §§ 601–644, 607(a), (b)(1)(A).

13. Social Security and Public Welfare ⇐1

If bill were to be adopted which provided that a person who has no dependent children and who is determined by department of public welfare in accordance with its regulations to be employable should not be eligible for general assistance, amended general welfare statute which provided, inter alia, that the Commonwealth would no longer purport to assist all its residents in need of assistance, could not be said to impermissibly presume that any persons excluded from coverage are not in fact needy. M.G.L.A. c. 117 § 1.

14. Social Security and Public Welfare ⇐1

An irrebuttable presumption analysis is not an appropriate gauge of constitutionality of a statute such as proposed bill providing, inter alia, that a person who has no dependent children and who is determined by the department of public welfare in accordance with its regulations to be employable shall not be eligible for general assistance. M.G.L.A. c. 117 § 1 et seq.

15. Constitutional Law ⇐213, 254

Due process challenge to statute conferring welfare benefits dovetails into the claim that the classification drawn by statute between those eligible for benefits and those not eligible violates equal protection; in either case, question for the court is whether the eligibility test rationally furthers a legitimate state purpose. U.S.C.A. Const. Amends. 5, 14.

16. Social Security and Public Welfare ⇐1

State has a valid interest in preserving the fiscal integrity of its programs, and may legitimately attempt to limit expenditures for public assistance.

17. Social Security and Public Welfare ⇐1

Legislature may properly conclude that an allocation of funds to a somewhat limited class of recipients is preferable to spreading those same funds among all potential recipients.

18. Social Security and Public Welfare ⇐1

State has no constitutional obligation to provide financial assistance to all needy residents.

19. Social Security and Public Welfare ⇐1

Given Commonwealth's objective of preserving fiscal integrity of its welfare programs, bill which provided that a person who had no dependent children and

OPINION

who was determined [illegible] public welfare in accord[illegible]ations to be employable [illegible]e for general assistan[illegible]eans of accomplishing [illegible]rom invidious discrimin[illegible]l effect of this exclusi[illegible]e to give favored tre[illegible]rm and to those wi[illegible]ce it would not be ir[illegible]ature to conclude th[illegible]otential recipients wer[illegible]ear hardships of an i[illegible]f living. M.G.L.A. c. 11[illegible]

20. Social Security and [illegible]

Regulations of the [illegible] welfare which are [illegible]rpose of statutes rel[illegible]f may be challenged [illegible] under the admin[illegible]tatutes. M.G.L.A. c. 3[illegible] et seq.

21. Social Security and [illegible]

Determination by [illegible]e welfare that a [illegible] employable" under [illegible]. and hence is in[illegible]f benefits, would [illegible]al safeguards, incl[illegible]opportunity for j[illegible]. c. 18 § 16; c. 117 [illegible]

22. Constitutional Law [illegible]

[illegible] it is not the provi[illegible]al Court to pass [illegible]osed legislation.

23. Constitutional Law [illegible]

[illegible]onstitution does [illegible]ature choose betw[illegible] of a problem or[illegible]m at all, but rathe[illegible]e to select one pha[illegible] a remedy there,

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[illegible] July 29, 1975, the [illegible]llowing answers

who was determined by department of welfare in accordance with its regulations to be employable would not be eligible for general assistance was a rational means of accomplishing that objective, free from invidious discrimination, since generally effect of this exclusion would appear to be to give favored treatment to aged and disabled and to those with dependents, and it would not be irrational for the legislature to conclude that these classes of potential recipients were the least able to endure hardships of an inadequate standard of living. M.G.L.A. c. 117 § 1 et seq.

Social Security and Public Welfare ⇐6

Regulations of the department of public welfare which are arbitrary in light of purpose of statutes relating to general relief may be challenged at the appropriate time under the administrative procedure provided. M.G.L.A. c. 30A §§ 3, 7; c. 117 § 1 et seq.

Social Security and Public Welfare ⇐6

Determination by the department of public welfare that a particular individual is "employable" under department's regulations, and hence is ineligible for general relief benefits, would be subject to procedural safeguards, including a hearing and the opportunity for judicial review. M.G.L.A. c. 18 § 16; c. 117 § 1 et seq.

Constitutional Law ⇐70.3(4)

It is not the province of the Supreme Judicial Court to pass on the wisdom of proposed legislation.

Constitutional Law ⇐209

Constitution does not require that the Legislature choose between attacking every aspect of a problem or not attacking the problem at all, but rather permits the legislature to select one phase of one field and apply a remedy there, neglecting the others.

On July 29, 1975, the Justices submitted the following answers to questions propounded to them by the House of Representatives.

To the Honorable the House of Representatives of the Commonwealth of Massachusetts:

The Justices of the Supreme Judicial Court respectfully submit these answers to the questions set forth in an order adopted by the House of Representatives on June 25, 1975, and transmitted to us on July 2, 1975. The order recites the pendency before the House of a bill, House No. 6092, Appendix A, entitled, "An Act to further regulate certain programs of financial and medical assistance." It is stated that "[g]rave doubt exists as to the constitutionality of said bill, if enacted into law." A copy of the bill was attached to the order. The bill proposes, inter alia, certain amendments to §§ 1 and 4 of c. 117, and § 6 of c. 118E, of the General Laws, and these particular amendments are the occasion of the questions which are:

"1. Would the provisions of section 1 of said House, No. 6092, Appendix A, which delegate to the department of public welfare the power to determine eligibility for assistance without establishing any guidelines therefor be in violation of Article XXX of Part the First of the Constitution of the Commonwealth providing for the separation of the Legislative, Executive and Judicial departments?

"2. Would the provisions of section 2 of said House, No. 6092, Appendix A, making certain unemployed parents ineligible for assistance be in violation of the federal statutes in view of the decision in *Paul R. Philbrook etc. Appellant v. Jean Glodgett et al and Caspar W. Weinberger, Secretary of Health, Education and Welfare, Appellant vs. Jean Glodgett et al* [— U.S. —, 95 S.Ct. 1893, 44 L.Ed.2d 525] United States Supreme Court No. 74-1820 and 74-132—June 9, 1975?

"3. Would the provisions of said section 2 of said House, No. 6092, Appendix A, making a person who has no dependent

children and who is determined by the department in accordance with its regulations to be employable ineligible for assistance under chapter 117 of the General Laws be in violation of the Due Process Clause and of the Equal Protection Clause in view of the decision in *Morales vs.* [*M*]*Winter*, [393 F.Supp. 88] United States Court of Appeals for the First Circuit? [1]

"4. Would the provisions of section 6 of said House, No. 6092, Appendix A, which delegate to the department of public welfare the power to provide financial assistance for such medical care or services as said Title XIX and regulations adopted thereunder by the Secretary of Health, Education and Welfare require, without any further guidelines, be in violation of Article XXX of Part the First of the Constitution of the Commonwealth providing for the separation of the Legislative, Executive and Judicial departments?"

In response to our invitation to interested persons to file briefs, briefs were received from the Governor of the Commonwealth, the Secretary of the Executive Office of Human Services, the Commissioner of Public Welfare, Action for Boston Community Development, Inc., Western Massachusetts Legal Services, the Boston Legal Assistance Project, Massachusetts Law Reform Institute (the latter three on behalf of various individuals and welfare rights organizations), and Jack H. Backman as an individual.

1. Questions 1 and 4 may be treated together since each is concerned with whether a particular delegation of power to the Department of Public Welfare (the department) would violate the separation of powers guaranty of art. 30 of our Declaration of Rights. In each case the question asks if the delegation would be proper without further guidelines set forth in the statute.

[1] The principles governing the permissible extent of a delegation of legislative power to an administrative agency have often been stated by this court. One recurrent theme is that specific standards need not be set out in the statute where the agency can find general guidance in the purposes and overall scheme of the statute. A typical formulation of the test is that which appears in *Massachusetts Port Authy. v. Boston Safe Deposit & Trust Co.*, 348 Mass. 538, 544, 205 N.E.2d 346, 351 (1965): "The standards for action to carry out a declared legislative policy may be found not only in the express provisions of a statute but also in its necessary implications. The purpose, to a substantial degree, sets the standards. A detailed specification of standards is not required. The Legislature may delegate to a board or officer the working out of the details of a policy adopted by the Legislature." See *Commonwealth v. Hudson*, 342 Mass. 335, 341–342, 52 N.E.2d 566 (1961); *Commonwealth v. Diaz*, 326 Mass. 524, 527–528, 95 N.E.2d 666 (1950); *Opinion of the Justices*, 334 Mass. 721, 743, 136 N.E.2d 223 (1956); *Corning Glass Works v. Ann & Hope, Inc. of Danvers*, — Mass. —, ——— [a], 294 N.E.2d 354 (1973), and cases cited; Cooper, State Administrative Law, 68–69 (1965). As will appear more fully below, we believe that sufficient guidelines may be gleaned from an examination of the statutory framework and purposes surrounding each of these proposed amendments to bring them within this principle.

Question 1 refers to a proposal in § 1 of House Bill No. 6092, Appendix A, to rewrite the first paragraph of § 1 of c. 117, as most recently amended through St. 1972, c. 623, § 2, the Commonwealth's so-called General Relief (GR) program. As presently written, c. 117, § 1, provides that the Commonwealth, acting through the de-

1. The correct title of the case referred to is *Morales v. Minter*, 393 F.Supp. 88 (D.Mass. 1975) (3-judge District Court).

a. Mass.Adv.Sh. (1973) 575, 580–587.

ment, "shall assist, to the extent practicable, all poor and indigent persons residing therein, whenever they stand in need of such assistance. The aid furnished shall be determined by the department on the basis of the circumstances surrounding each application shall be sufficient to maintain an adequate standard of living for the poor and indigent applicant and his immediate family who are eligible as hereinafter provided, [and] shall be in an amount to be determined in accordance with budgetary standards of the department . . .." This language may be contrasted with that which would replace it were the bill to be adopted: "The commonwealth, acting by and through the department of public welfare, shall provide assistance of residents of the commonwealth found by the department to be eligible for such assistance in accordance with this chapter." The argument is made by some of the amici that adoption of this amendment would delegate to the department complete authority to devise any relief program it desired, giving it unbridled discretion to determine who would be eligible for benefits and what benefits would be provided. We believe this argument overlooks a number of significant guidelines and safeguards which emerge from consideration of c. 117 as a whole, particularly when read together with c. 18, which establishes the Department of Public Welfare.

We look first to § 2 of the bill, which would amend c. 117, § 4, by setting out a number of specific classes of persons who would be ineligible for GR benefits. Although § 4 includes no description of those who are eligible, there can be no doubt that the only test for those not declared to be ineligible is financial need. Any other possible criteria are eliminated if only by way of negative inference from the exclusions in § 4. This conclusion finds further support in the traditional purpose of c. 117 as a relief program for all those in need, and from the manifest object of the proposed amendment to restrict the scope of c. 117 only in specified areas.

[2-4] That the proposed bill fails to prescribe the contours of a general standard of need does not render it invalid. In fact, the department is required by G.L. c. 18, § 2(B)(g), to formulate a standard budget of assistance, the adequacy of which is reviewable annually. This is not an improper delegation of authority. See *Massachusetts Housing Fin. Agency v. New England Merch. Natl. Bank*, 356 Mass. 202, 214, 249 N.E.2d 599 (1969) (upholding delegation to agency to determine what constitutes "low income"). The department has traditionally determined the standard of need for recipients and undoubtedly has developed an expertise in the complexities of this matter. See *McNamara v. Director of Civil Serv.*, 330 Mass. 22, 27, 110 N.E.2d 840 (1953); Cooper, State Administrative Law, 75-79, 83-84 (1965). Its discretion in determining the standard of need and, hence, the eligibility test for GR, is circumscribed through a number of devices. For example, its provision of welfare services must be "fair, just and equitable." G.L. c. 18, § 2(B)(d). Any potential for arbitrariness is checked by ensuring the opportunity for judicial review of regulations promulgated under the authority of G.L. c. 18, § 10, and for review of individual determinations of ineligibility. G.L. c. 18, § 16; c. 30A, §§ 7, 14. See Davis, Administrative Law, § 2.00-5 (Supp.1970); Cooper, State Administrative Law, *supra*, at 81-82.

Objection is made that under the proposed amendment the department is no longer required to provide recipients with sufficient assistance "to maintain an adequate standard of living." While this is true, the result is not to give the department untrammeled discretion to decide what benefits to provide. Rather the Legislature, in determining the amount of the appropriation for c. 117, makes the critical choice with regard to the level of benefits. With whatever funds it has available, the department is charged with formulating "the policies, procedures and rules necessary for the full and efficient implementa-

tion" of the GR program. G.L. c. 18, § 2(B)(a). Allocation of assistance payments among those eligible must be on "a fair, just and equitable basis" (G.L. c. 18, § 2(B)(d)), and, as mentioned, this determination will be subject to judicial review to safeguard against arbitrariness. In short, we have no doubt that the delegation to the department contained in § 1 of the bill would not exceed the constitutional limit. Accordingly we answer question 1, "No."

[5] Question 4 refers to a proposal in § 6 of House Bill No. 6092, Appendix A, to amend G.L. c. 118E, § 6, as most recently amended by St.1973, c. 1068, § 2. Chapter 118E establishes a program of medical care and services to needy residents of the Commonwealth. As presently written, § 6 of c. 118E lists seventeen categories of services for which the department is required to provide financial assistance to those eligible. Certain of these categories of services are mandatory if the State is to receive Federal matching grants under Title XIX of the Social Security Act. 42 U.S.C. §§ 1396a(a)(13)(B), 1396d(a)(1)–(5) (1970). Other categories are optional; that is, the Federal government will reimburse the States if they choose to provide the service but they are not required to do so. The proposed amendment to § 6 would delete the requirement that all seventeen services be provided and would instead require only that the department provide assistance for those services which are mandatory under Title XIX and the regulations promulgated thereunder by the Secretary of Health, Education and Welfare (HEW). Obviously there is no delegation problem here since the department has no choice but to follow the very specific Federal requirements.[2] In addition to the language of the amendment, see G.L. c. 118E, §§ 1, 3; c. 18, § 10. The difficulty lies in the discretion delegated to the department by the following language of the proposed amendment: "The department may provide financial assistance for such additional medical care or services as said Title XIX and said regulations permit."

[6, 7] In concluding that this delegation is a proper one, we emphasize that the Legislature is permitted to delegate to an administrative agency the authority to determine how to spend funds appropriated for a general purpose so as best to carry out that purpose. This theme received extensive treatment in *Opinion of the Justices*, 302 Mass. 605, 615–616, 19 N.E.2d 807, 815 (1939): "[It is] clear that the General Court in the exercise of its legislative power of appropriation has a broad scope for determining whether it will prescribe in detail the particular purposes for which money appropriated shall be expended or, on the other hand, will permit executive or administrative officers or boards to exercise judgment and discretion within a wide field in the expenditure of money appropriated for a given object to accomplish the general purposes of the appropriation. The choice of the latter alternative has been made frequently. . . . Such a choice—at least within reasonable limits—does not amount to an unconstitutional delegation of legislative power. The General Court merely leaves to executive officers or boards the question of administration as to the means by which the object of an appropriation may be accomplished."

The argument is made that c. 118E contains no expression of legislative purpose to guide the department in exercising its discretion. But §§ 3 and 4 of c. 118E indicate that the department is bound to formulate its policies with two considerations in particular in mind: "the best interests of the recipients" and the limit of "available funds appropriated for the purposes of

2. The department would have discretion, however, with respect to the services to be provided to low income persons who are not eligible for the Federal categorical assistance programs. The Federal requirement with respect to these persons is only that seven of the sixteen specified Federal services be included in the plan; thus, no single category of medical service is mandatory. 42 U.S.C. § 1396a(a)(13)(C)(ii) (1970).

...s chapter." Also, since the medical assistance program is to be administered in conformity with the provisions of Title XIX of the Social Security Act (G.L. c. 118E, § 1), we may look further to the federal law for guidelines. See *Massachusetts Bay Transp. Authy. v. Boston Safe Deposit & Trust Co.*, 348 Mass. 538, ..., 205 N.E.2d 346 (1965).

The purpose of Title XIX is stated to be ... enable each State "as far as practicable" ... provide medical assistance to its needy ...izens. 42 U.S.C. § 1396 (1970). This ...mports with the considerations mentioned above. Federal law further requires that the State establish reasonable standards for determining the extent of medical assistance which are consistent with the objectives of Title XIX. 42 U.S.C. § 1396a(a)(17) (1970). To this end HEW regulations require that the State plan "[s]pecify the amount and/or duration of each item of medical care or service that will be provided. . . ." 45 C.F.R. (1974) § 249.10(a)(5)(i). See G.L. c. 118E, § 6, par. 2. This means that if the proposed amendment is adopted the department's choice as to which of the optional services it will provide will necessarily be set out in departmental rules and regulations, and, hence, subject to full review. G.L. c. 30A, §§ 3, 7. As to individual determinations of eligibility for medical assistance, see G.L. c. 18, § 16; c. 118E, §§ 9, 22. Moreover, under the HEW regulations, the items to be provided "must be sufficient in amount, duration and scope to reasonably achieve their purpose." 45 C.F.R. (1974) § 249.10(a)(5)(i). This latter requirement adds a meaningful check on the department's discretion in choosing which items of medical service to include in the plan.

[8, 9] Some of the amici place great emphasis on the significant and technical policy decisions which must be made before settling on which of the optional services should be provided. Undoubtedly an intelligent decision would be based on a detailed understanding of the relationships among the various services, their costs, and their effectiveness. But the complexity of the decision-making process is not the litmus paper for testing the validity of a legislative delegation of authority. The department is in as good a position, if not a better one, as the Legislature to evaluate all the factors going into the determination of how best to provide for the medical care of the needy within the constraint of a limited budget.[3] In fact, the department has been charged with this responsibility in the past, not with respect to specifying the particular services available but as to establishing the "amount, duration and scope" of all the categories of medical care and services. G.L. c. 118E, § 6, par. 2. In light of the manifest purposes of the legislation and the safeguards against arbitrary decision making, we believe the delegation contained in § 6 of House Bill No. 6092, Appendix A, would not offend the Constitution of the Commonwealth. Our answer to question 4 is, "No."

2. Question 2 refers us to the provisions in § 2 of House Bill No. 6092, Appendix A, making certain unemployed parents ineligible for assistance under c. 117. The pertinent sentence reads as follows: "A person who has applied to the department for assistance under chapter one hundred and eighteen as an unemployed parent and who would be eligible for such assistance under said chapter but for the waiting period of thirty days required by federal law shall not be eligible for assistance

3. The amici rely on *Dimery v. Department of Social Serv. of the State of Iowa*, 320 F.Supp. 1123 (S.D.Iowa, 1969), vacated and remanded on other grounds, 398 U.S. 322, 90 S.Ct. 1871, 26 L.Ed.2d 265 (1970). However, the court's holding in that case went no further than finding an improper delegation in giving the welfare department authority to set eligibility standards relative to the State's medical assistance program which were more restrictive than those specifically established by the Legislature. In so far as the implications of the court's reasoning may extend beyond the holding in the case, we decline to adopt that reasoning here.

under this chapter." A brief explanation of the framework of c. 118 is necessary.

[10–12] Chapter 118 sets out the provisions of the Massachusetts Aid to Families with Dependent Children (AFDC) program. This program is administered so as to qualify the State for Federal grants under Title IV of the Social Security Act, 42 U.S.C. §§ 601–644 (1970). Assistance under AFDC is available to families with a "dependent child," defined to include a needy child deprived of parental support or care by reason of "the unemployment . . . of his father." 42 U.S.C. § 607(a) (1970). G.L. c. 118 § 1. To be eligible under the Federal law, however, the father must have been unemployed for at least thirty days prior to receipt of any assistance. 42 U.S.C. § 607(b)(1)(A) (1970). Since a family might be in need of assistance during this thirty-day period yet ineligible for AFDC benefits, assistance would presently be available under the provisions of c. 117, the General Relief program. Under the proposed amendment to c. 117, § 4, GR benefits would be denied in this situation.

The question asked of us is only whether this section of the bill would violate Federal statutes in view of the Supreme Court's decision in *Philbrook v. Glodgett*, — U. S. —, 95 S.Ct. 1893, 44 L.Ed.2d 525 (1975). The *Philbrook* case involved the narrow issue whether a Vermont regulation concerning that State's administration of the "unemployed father" portion of AFDC conflicted with Federal law. Although the court struck down the regulation, it requires very little discussion to reach the conclusion that there is nothing in the *Philbrook* decision or the Social Security Act to prevent the Legislature from enacting the provision in question here. The proposal with which we are concerned has absolutely no effect on the Commonwealth's administration of AFDC or any other Federal program. Rather, it amends the eligibility standards of a wholly State funded general assistance program. Of course c. 117 is subject to all Federal constitutional requirements (*Pease v. Hansen*, 404 U.S. 70, 92 S.Ct. 318, 30 L.Ed.2d 224 [1971]), and we express no opinion on the constitutionality of this portion of the bill. But it is clear that a State is entitled to spend its own funds for welfare purposes without Federal statutory constraints. *Rosado v. Wyman*, 397 U.S. 397, 420, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970). We answer question 2, "No."

3. The third question relates to another exclusion from General Relief benefits proposed in § 2 of House Bill No. 6092, Appendix A. The final sentence of § 2 would amend c. 117 to provide that "[a] person who has no dependent children and who is determined by the department in accordance with its regulations to be employable shall not be eligible for assistance under this chapter." We are asked whether this exclusion violates the constitutional guaranties of due process and equal protection, particularly in view of the decision in *Morales v. Minter*, 393 F.Supp. 88 (D. Mass.1975). In examining this issue, we are mindful of the principle that "[t]here is no presumption of validity when we consider a proposed statute in an advisory opinion." *Opinion of the Justices*, 345 Mass. 780, 781–782, 189 N.E.2d 849, 850 (1963).

In the *Morales* case, the plaintiffs challenged the constitutionality of the requirement in G.L. c. 117, § 4, that applicants for GR be between the ages of eighteen and sixty-five years. The court agreed with the contentions of the plaintiffs and struck down the statute on due process and equal protection grounds.

The court's reasoning was based primarily on the thesis that the statute created an "irrebuttable presumption" in violation of the due process clause. See *Stanley v. Illinois*, 405 U.S. 645, 657–658, 92 S.Ct. 1208, 31 L.Ed.2d 551 (19[illegible]); *Vlandis v. Kline*, 412 U.S. 441, 452, 93 S.Ct. 2230, 37 L.Ed. 2d 63 (1973); *United States Dept. of Agriculture v. Murry*, 413 U.S. 508, 514, 93

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S.Ct. 2832, 37 L.Ed.2d 767 (1973); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 644–648, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); *Fiorentino v. Probate Court*, —— Mass. ——, ——[b], 310 N.E.2d 112 (1974); *Milton v. Civil Serv. Commn.*, —— Mass. ——, ——[c], 312 N.E.2d 188 (1974). Under G.L. c. 117, § 1, assistance is to be made available to "all poor and indigent persons residing . . . [in the Commonwealth] whenever they stand in need of such assistance." Relying principally on this provision, the court in the *Morales* case found that the age restrictions in § 4 established a "conclusive and irrebuttable presumption," with no opportunity for an individualized determination, that persons under eighteen or over sixty-five were not in need of financial assistance from the Commonwealth. Because that presumption was "not necessarily or universally true" (*Vlandis v. Kline, supra*), the court concluded that § 4 violated due process.

[13] Without questioning the court's reasoning in the *Morales* case, we believe that the proposal before us stands on a different footing from the age restrictions considered by the court in *Morales*. Most important to our analysis is the fact that § 1 of the bill would completely rewrite the first paragraph of G.L. c. 117, § 1. No longer would the Commonwealth purport to assist *all* its residents in need of assistance. Instead, GR benefits would be available only to those residents "found by the department to be eligible for such assistance in accordance with this chapter." There can be no doubt that the bill is aimed at replacing the standard of eligibility based solely on need as presently contained in c. 117, § 1. The Governor's message submitted with the bill explains that "[o]ur intention in redefining eligibility for General Relief is to make it clear that General Relief henceforth cannot be expected to meet the needs of every person in the Commonwealth with a demonstrable need, regardless of that person's other characteristics or his employment situation." It is thus apparent that were the bill to be adopted, the amended statute could not be said to presume that any persons excluded from coverage are not in fact needy. Consequently, we are not faced with the question whether it is "necessarily or universally true" that "employable" persons are not in need of assistance.

[14] Moving beyond this consideration, we are also of opinion that the irrebuttable presumption analysis is not an appropriate gauge of the constitutionality of a statute such as that proposed in House Bill No. 6092, Appendix A. This conclusion is based on the very recent opinion of the Supreme Court in *Weinberger v. Salfi*, —— U.S. ——, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), which was decided subsequent to the *Morales* case. The issue in the *Salfi* case was the constitutionality of a provision in the Social Security Act to the effect that surviving wives and stepchildren of deceased wage earners would be eligible for insurance benefits only if their respective relationships with the deceased had begun at least nine months prior to his death. The lower court had determined that the purpose of the duration-of-relationship requirement was to prevent the use of sham marriages to secure Social Security payments. On that basis, the court found that the requirement conclusively presumed that marriages of less than nine months were entered into for the purpose of obtaining Social Security benefits. Since that presumption was not necessarily or universally true, the requirement was held to violate due process. On appeal, the Supreme Court reversed, and in the process thoroughly discussed the appropriate standard of review in cases challenging the constitutionality of welfare legislation. The court distinguished earlier "irrebuttable presumption" cases such as *Stanley v. Illinois, supra*, and *Cleveland Bd. of Educ. v. LaFleur, supra*, as having involved claims enjoying "constitutionally protected status."

b. Mass.Adv.Sh. (1974) 403, 414–415.

c. Mass.Adv.Sh. (1974) 843, 853.

— U.S. at —, 95 S.Ct. 2457 (1975). By contrast, "a noncontractual claim to receive funds from the public treasury" does not enjoy such status. *Ibid.* The court observed that the Social Security benefits in issue were "available upon compliance with an objective criterion, one which the legislature considered to bear a sufficiently close nexus with underlying policy objectives to be used as the test for eligibility. . . . [The plaintiffs were] completely free to present evidence that they . . . [met] the specified requirements; failing in this effort, their only constitutional claim is that the test they cannot meet is not so rationally related to a legitimate legislative objective that it can be used to deprive them of benefits available to those who do satisfy that test." *Ibid.*

[15] Viewed in this manner, a due process challenge to a statute conferring welfare benefits dovetails into the claim that the classification drawn by the statute between those eligible for benefits and those not eligible violates equal protection. See Note, 87 Harv.L.Rev. 1534, 1545 (1974). In either case, the question for the court is whether the eligibility test rationally furthers a legitimate State purpose. As was stated by the Supreme Court in *Dandridge v. Williams*, 397 U.S. 471, 485–487, 90 S.Ct. 1153, 1161–1162, 25 L.Ed.2d 491 (1970): "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369. . . . It is enough that the State's action be rationally based and free from invidious discrimination." See *Flemming v. Nestor*, 363 U.S. 603, 611, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960); *Richardson v. Belcher*, 404 U.S. 78, 81, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971); *Jefferson v. Hackney*, 406 U.S. 535, 546–547, 92 S.Ct. 1724, 32 L.Ed.2d 285 (1972); *Weinberger v. Salfi, supra*, — U.S. at —, 95 S.Ct. 2457; *Mobil Oil Corp. v. Attorney Gen.*, — Mass. —, —[d], 280 N.E.2d 406 (1972); *Commonwealth v. Henry's Drywall Co., Inc.*, — Mass. —, —[e], 320 N.E.2d 911 (1974).

[16–18] With this test in mind, we turn to consideration of the validity of the proposal before us to exclude from GR benefits those persons who have no dependents and are determined by the Department of Public Welfare to be "employable." The principal objective of this proposed amendment is clear: to achieve what is thought to be a necessary allocation of finite State resources in a time of fiscal crisis. According to the Governor, "the simple fact is that the scope of the current [welfare] programs extends beyond the Commonwealth's ability to pay." There can be no doubt that the State has a valid interest in preserving the fiscal integrity of its programs and that it may legitimately attempt to limit expenditures for public assistance programs. *Shapiro v. Thompson*, 394 U.S. 618, 633, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); *Dandridge v. Williams, supra*, 397 U.S. at 487, 90 S.Ct. 1153. *Morales v. Minter, supra*, at 100. The Legislature may properly conclude, for example, that an allocation of funds to a somewhat limited class of recipients is preferable to spreading those same funds among all potential recipients. Cf. *Dandridge v. Williams, supra*, 397 U.S. at 479–480, 90 S.Ct. 1153. We might add that we are aware of no constitutional obligation on the State to provide financial assistance to all its needy residents. In fact, in many States large numbers of needy persons are not entitled to any form of governmental cash benefit. LaFrance, Schroeder, Bennett & Boyd, Law of the Poor, §§ 305, 309 (1973).

d. Mass.Adv.Sh. (1972) 501, 576.

e. Mass.Adv.Sh. (1974) 2377, 2385–2386.

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[19-21] Given the Commonwealth's objective of preserving the fiscal integrity of its welfare programs, the question is whether this particular exclusion is a rational means of accomplishing that objective, free from invidious discrimination. We cannot say that it is not. The general effect of this exclusion would appear to be to give favored treatment to the aged and the infirm (i. e., those not employable) and those with dependents. For the Legislature to conclude that these classes of potential recipients are the least able to bear the hardships of an inadequate standard of living would not be irrational. Cf. *Jefferson v. Hackney*, 406 U.S. 535, 549, 92 S.Ct. 1724, 32 L.Ed.2d 285 (1972). Indeed, it is essentially this classification which appears in the Social Security Act which provides federal assistance only for categorical programs available to the aged, the blind, the permanently and totally disabled, and the families of dependent children. We doubt that anyone would seriously challenge the constitutionality of the Social Security Act on the ground that able bodied persons without dependents are ineligible for Federal cash grants regardless of their financial need. This is not to say that "employable" persons would not in some cases be just as much in need of assistance as those deemed eligible for GR benefits under the proposed amendment. Nor is it to deny that the general purpose of the Commonwealth's welfare programs is to assist needy persons. But, as discussed above, were the bill to be enacted the legislative intent could no longer be interpreted as that of assisting *all* needy persons. Contrast *Morales v. Minter, supra*. And among those persons with a genuine financial need, those who are employable[4] at least have the opportunity to meet that need on their own in the job market.[5] Furthermore, such persons receive the benefit of other governmental efforts on their behalf. If they are able to find employment, they will have the advantage of programs designed to ensure adequate wages through such devices as minimum wage laws and the protection of collective bargaining rights. G.L. c. 150A, c. 151. See *Macias v. Finch*, 324 F.Supp. 1252, 1260–1261 (N.D.Cal. 1970). If they cannot obtain employment the Commonwealth responds in part through a program for unemployment compensation. G.L. c. 151A, §§ 22, 24, 74. See *General Elec. Co. v. Director of Div. of Employment Security*, 349 Mass. 207, 210–211, 207 N.E.2d 289 (1965). Also, as argued in the Governor's brief, State and Federal programs of public employment and manpower training are directed at assisting employable persons. These programs would not, of course, be of any aid to persons who are not employable. Thus, in light of the Commonwealth's asserted inability to provide assistance to all those in financial need, the eligibility restriction introduced by the bill does not appear to us to represent an irrational means to accomplish the Commonwealth's objectives.

4. We assume, of course, that the regulations promulgated by the department to define the class of persons to be deemed "employable" would be written with this rationale in mind. Regulations which are arbitrary in light of the statutory purpose could be challenged at the appropriate time under G.L. c. 30A, §§ 3, 7. Furthermore, a determination that a particular individual is "employable" under the regulations and, hence, ineligible for GR benefits would be subject to procedural safeguards, including a hearing and the opportunity for judicial review. G.L. c. 18, § 16.

5. *Mooney v. Pickett*, 4 Cal.3d 669, 679–680, 94 Cal.Rptr. 279, 483 P.2d 1231 (1971), does not support the argument to the contrary. That case involved only the question whether a county regulation excluding "employable" unmarried persons from the general relief program conflicted with the statutory requirement that counties support "all . . . poor, indigent persons" residing therein. In striking down the regulation, the court merely rejected the contention that "employability" constituted an economic resource of such a character as to take employable persons out of the class of poor residents who must by statute be supported by the county. The court gave no indication that a statute restricting general relief to persons not employable would violate constitutional norms.

[22, 23] In reaching this conclusion we are not insensitive to the serious implications of the measures proposed here. For a great many residents of the Commonwealth, the result may be extremely harsh. In a time of high unemployment, it may be little comfort indeed for persons genuinely in need to be told they are "employable" so that no relief is available. For such people, the effect of adopting this legislation could be to leave them with no source of income and nowhere to turn. As argued by some of the amici, this state of affairs represents a departure from a tradition of assisting all residents of the Commonwealth in need which dates back to colonial times. Colonial Laws (1890 ed.) 123, § 2. See St.1788, c. 61; *Cohasset v. Scituate*, 309 Mass. 402, 405–408, 34 N.E.2d 699 (1941). Nevertheless, it is not our province to pass on the wisdom of proposed legislation. Our concern here is only with the constitutionality of this particular exclusion from the coverage of c. 117. We must emphasize that the Constitution does not require that the Legislature "choose between attacking every aspect of a problem or not attacking the problem at all" (*Dandridge v. Williams, supra*, 397 U.S. at 486–487, 90 S.Ct. at 1162), but rather permits the Legislature to "select one phase of one field and apply a remedy there, neglecting the others." *Williamson v. Lee Optical of Okl. Inc.*, 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563 (1955). See *Mobil Oil Corp. v. Attorney Gen.*, — Mass. —, —[f], 280 N.E.2d 406 (1972); *Commonwealth v. Henry's Drywall Co. Inc.*, — Mass. —, —[g], 320 N.E.2d 911 (1974). Recognizing the Commonwealth's legitimate interest in limiting the resources to be allocated to its public assistance programs, we must conclude that the method proposed here to accomplish that end is rationally based and free from invidious discrimination. Consequently, we answer question 3, "No."

In summary, we answer

question 1, "No";

question 2, "No";

question 3, "No";

question 4, "No."

G. JOSEPH TAURO

PAUL C. REARDON

FRANCIS J. QUIRICO

ROBERT BRAUCHER

EDWARD F. HENNESSEY

BENJAMIN KAPLAN

HERBERT P. WILKINS

COMMONWEALTH

v.

Warren A. GIBSON.

Supreme Judicial Court of Massachusetts, Norfolk.

Argued March 4, 1975.

Decided Aug. 22, 1975.

Defendant was convicted in the Superior Court, Norfolk, Beaudreau, J., of first-degree murder and he appealed. The Supreme Judicial Court, Quirico, J., held that indictment was valid even if hearsay evidence had been presented to grand jury, that trial court's instruction on burden of proof and inferences to be drawn from the evidence was adequate; and that the evidence sustained the conviction.

Affirmed.

f. Mass.Adv.Sh. (1972) 561, 575.

g. Mass.Adv.Sh. (1974) 2377, 2387.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GAYLE MC QUOID HOLLEY, INDIVIDUALLY AND ON BEHALF OF JAMES MC QUOID, NORMAN MC QUOID, THOMAS MC QUOID, DOUGLAS MC QUOID, MICHAEL MC QUOID AND ADELAINE MC QUOID, HER MINOR CHILDREN,

PLAINTIFFS-APPELLANTS,

-AGAINST-

ABE LAVINE, AS COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, AND JAMES REED, AS COMMISSIONER OF THE MONROE COUNTY DEPARTMENT OF SOCIAL SERVICES,

DEFENDANTS-APPELLEES,

DOCKET NO. 76-7588

AFFIDAVIT OF SERVICE BY MAIL OF BRIEF OF APPELLEE REED.

STATE OF NEW YORK)
COUNTY OF MONROE) SS:
CITY OF ROCHESTER)

CHARLES G. PORRECA, BEING DULY SWORN, DEPOSES AND SAYS:

1. THAT ON THE 14TH DAY OF JANUARY 1977, DEPONENT SERVED THE WITHIN BRIEF ON BEHALF OF APPELLEE JAMES REED, UPON K. WADE EATON, ESQ., THE ATTORNEY FOR THE APPELLANT-PLAINTIFF HEREIN, AND UPON ALAN W. RUBENSTEIN, ESQ., PRINCIPAL ATTORNEY, OFFICE OF THE NEW YORK STATE ATTORNEY-GENERAL, ATTORNEY FOR APPELLEE STATE COMMISSIONER OF SOCIAL SERVICES, BY DEPOSITING TWO (2) TRUE COPIES OF THE SAME, SECURELY ENCLOSED IN A POST PAID WRAPPER IN THE POST OFFICE BOX REGULARLY MAINTAINED BY THE UNITED STATES GOVERNMENT AT NO. 111 WESTFALL ROAD, IN THE CITY OF ROCHESTER, 14620, IN THE COUNTY OF

MONROE, STATE OF NEW YORK, AND DIRECTED TO THE SAID ATTORNEY FOR THE PLAINTIFF-APPELLANT AT NO. 80 WEST MAIN STREET, CITY OF ROCHESTER, NEW YORK 14614, AND DIRECTED TO ALAN W. RUBENSTEIN, ESQ., PRINCIPAL ATTORNEY, OFFICE OF THE ATTORNEY-GENERAL, DEPARTMENT OF LAW, IN THE CITY OF ALBANY, STATE OF NEW YORK 12224, BEING THE ADDRESSES FOR BOT SAID ATTORNEYS WITHIN THE STATE OF NEW YORK, DESIGNATED BY THEM FOR THAT PURPOSE UPON THE PRECEDING PAPERS IN THIS ACTION, OR THE PLACE WHERE THEY THEN KEPT AN OFFICE, AND BETWEEN WHICH PLACES THERE THEN WAS, AND NOW IS, A REGULAR COMMUNICATION BY MAIL.

2. DEPONENT IS OVER EIGHTEEN (18) YEARS OF AGE, IS NOT A PARTY TO THIS ACTION, AND RESIDES IN THE CITY OF ROCHESTER, STATE OF NEW YORK.

Charles G. Porreca

CHARLES G. PORRECA

SWORN TO BEFORE ME THIS

14th DAY OF JANUARY, 1977.

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COMMISSIONER OF DEEDS